

No. 18,825 ✓

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, for the Use
and Benefit of Miller & Bentley Equip-
ment Company, Inc.,

Appellant,

vs.

JAMES H. KELLEY (KELLY), UNITED PA-
CIFIC INSURANCE COMPANY, MAURICE
RAMAGE and FRED AYALA,

Appellees.

Appeal from the District Court
for the District of Alaska

BRIEF OF APPELLANT

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U.S. DISTRICT COURT, FAIRBANKS, ALASKA

Subject Index

	Page
Jurisdictional Statement	1
Statement of the Case	2
Statute Involved	3
Specifications of Error Relied On	5
Question Presented	5
Argument	6
Conclusion	7

Table of Authorities Cited

Cases	Pages
United States v. Endebrock-White Co., (4th Cir. 1960) 275 F. 2d 57	7
Statutes	
28 U.S.C.A. 1291	2
Miller Act, 40 U.S.C. 270(a)	2
Miller Act, 40 U.S.C. 270(b)	3, 5

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Alaska. The judgment appealed from was entered on May 17, 1963. Pursuant to Rule 52(b), on May 22, 1963, appellant filed a motion to amend Findings of Fact and Conclusions of Law and to Make Additional Findings, and on June 21, 1963, the motion was heard and granted in certain respects and denied in others. Notice of Appeal was filed on July 11, 1963.

This Court has jurisdiction of the appeal by virtue of 28 U.S.C.A. 1291.

STATEMENT OF THE CASE

This is an action under the Miller Act, 40 U.S.C. 270(a), against a general contractor and his surety by a supplier of a subcontractor. The case has previously been before this Court, *United States of America for the Use and Benefit of Miller & Bentley Equipment Company, Inc. v. James H. Kelley, et al.*, No. 17,730. Pursuant to order of this Court, the opinion was not published.

On the previous appeal this Court had before it a cross-appeal by the general contractor and his surety from a summary judgment in favor of appellant-supplier. The issues before this Court on the cross-appeal were whether appellant was entitled to rental on equipment furnished to the subcontractor after the subcontract had been terminated (without notice to appellant) and whether appellant gave notice to the general contractor within the period required by law.

On each of these issues this Court stated that "a genuine issue of fact remains to be determined" and accordingly reversed the summary judgment and remanded the issues on the cross-appeal for further proceedings.

In accordance with the directions of this Court a trial on the issues raised on the cross-appeal was held, at the conclusion of which the District Court found

that the subcontract between the general contractor and the subcontractor was terminated on January 12, 1959, "that (appellant), as a reasonable and prudent supplier, should have known on or after February 15, 1959, of the termination of the subcontract and cannot claim to have continued in good faith to believe that its equipment was being used on the job after that date". The District Court further found that on April 28, 1959, appellant gave the general contractor notice of its claim, and that this notice was in compliance with the requirements of the Act. The District Court further found, however, that the 90 day period for giving notice to the general contractor expired on April 11, 1959, that appellant was not diligent "in making its claim", and under the facts and circumstances of the case did not, subsequent to January 13, 1959, furnish any labor or materials in the prosecution of the work under the general contractor's contract with the United States. Accordingly, judgment was granted to defendants.

STATUTE INVOLVED

The Miller Act, 40 U.S.C. 270(b) provides in its pertinent part:

"(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day

on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided, however, *That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made*, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.” (Emphasis supplied.)

SPECIFICATIONS OF ERROR RELIED ON

1. The District Court erred in holding that notwithstanding that appellant, as a reasonable and prudent supplier, knew or should have known on February 15, 1959, that its equipment was no longer on the project, appellant was required to give appellee James H. Kelley notice of its claim under the Miller Act, 40 U.S.C. 270(b) on or before April 11, 1959.

2. The District Court erred in dismissing the action on the grounds set forth in the preceding paragraph.

QUESTION PRESENTED

The question presented on this appeal is whether a supplier, renting equipment and furnishing other labor and materials to a subcontractor on a construction project subject to the Miller Act, who has no notice of the termination of the subcontract by the prime contractor, has ninety days in which to give the required statutory notice of claim to the prime contractor after he knew or should have known his equipment was no longer being used on the project, even though he was "not diligent" in giving the notice of claim. Stated in another way, the question presented is whether a supplier has the full statutory period of ninety days in which to give the required notice despite the fact that had he been "diligent" the supplier would have given notice in less than the ninety days permitted under 40 U.S.C. 270(b).

ARGUMENT

Under the findings of the District Court, appellant, as a reasonable and prudent supplier, should have known on or after February 15, 1959, that the general contractor had terminated the subcontract between him and the subcontractor to whom appellant had been renting equipment used in the performance of the subcontract. Clearly implicit in this Court's previous opinion is that the ninety day period for giving the notice required by the Act does not commence until a reasonable prudent supplier should have known of the termination of the subcontract and that its equipment was no longer being used on the job. Under this view, appellant had ninety days from February 15th—or until May 16th—within which to give the required notice. The District Court expressly found that notice which in form complied with the Act was given on April 28th. This was within the ninety day period, and accordingly satisfied the requirements of the Act.

Nevertheless, the District Court found that after being on notice of the termination of the subcontract appellant was not diligent in giving notice to the general contractor, and for some reason not manifest found that because of this lack of diligence appellant was not entitled to recover. Assuming that the ninety day period commences on the date appellant should have been on notice of the termination of the subcontract, the action of the District Court in imposing a limitation on the ninety day period based on a nebulous standard of diligence amounts to nothing less than judicial abrogation of Congressional enact-

ment. Under the Act appellant had ninety days after whatever date the law establishes as the date upon which the ninety day period commences. This Court having previously stated that the period commenced on the date when appellant knew or as a reasonable supplier should have known of the termination of the subcontract, the notice given by appellant was clearly within the ninety days and therefore satisfied the statutory requirements. cf. *United States v. Endebrock-White Co.*, (4th Cir. 1960) 275 F. 2d 57.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order dismissing the action be reversed, and the cause remanded for further proceedings.

Dated, Fairbanks, Alaska,
October 7, 1963.

CHARLES E. COLE,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES E. COLE.

